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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-785

MARIEMONT, INC.,

Petitioner,

v.

P. E. MASHETER, DIRECTOR
OF HIGHWAYS, STATE OF OHIO

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
ARGUMENT	5
REASONS FOR DENYING THE WRIT:	
A. Where State Statutes Provide for Appeal From Decisions Of Zoning Authorities, The Jurisdiction of The Trial Court Does Not Include The Right To Make A Determination Of The Propriety Of Zoning Decisions Which Were The Proper Subject Matter of Appeal	5
B. In Arriving At The Fair Market Value Of Property In An Eminent Domain Proceeding, Testimony Of The Highest And Best Use Of The Property Is Limited To Lawful Purposes Including The Probability Of A Change In Zoning To Permit A More Valuable Use Within The Reasonably Foreseeable Future	10
C. Where It is Shown That Other Similar Property In The Area Was Recently Rezoned Or That Development In Use Patterns Has Been Such That A Reclassification Would Fit Such Zoning Pattern Or Use, Such Use May Not Then Be Considered As The Property's Highest And Best Use When Contrary To Its Existing Zoning. A Refusal To Admit Such Evidence Does Not Deprive An Owner Of His Property Without Due Process	13
APPENDIX A Sections 307.56 and 2506.01, Ohio Revised Code.	16

CITATIONS

PAGE

Cases:

Board of Education v. Graham
15 Ohio App. (2d) 196 (1968) 11

City of Euclid v. The Lakeshore Co.
102 Ohio App. 96 (1956) m.c.o. appeal dismissed,
165 Ohio St. 501 (1956), certiorari denied, 352
U.S. 1025 11

Henle v. City of Euclid
97 O. App. 258 (1954), m.c.o. 162 Ohio St. 280 .. 7

Robinson v. Commonwealth
335 Mass. 630 (1957) 8

Tharp v. Urban Renewal & Community Development Agency 389 S. W. 2d 453 (1965, Ky.) 8

Statutes:

Section 307.56, Ohio Revised Code 7
Section 2506.01, Ohio Revised Code 7

Miscellaneous:

Opinion No. 69-098, Opinions of Attorney General of Ohio 12

4 Nichols on Eminent Domain (3d Ed.), Section 12.322, Page 389 8

4 Nichols on Eminent Domain (3d Ed.), Page 238 10

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OPINIONS BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Franklin County, Ohio rendered a written decision which is attached as Appendix A, Petitioner's Brief pp. 14-23 and which was not reported. On February 9, 1971, the Court of Appeals on reconsideration rendered a written unreported decision modifying its prior decision. Such decision is attached as Appendix B, Petitioner's Brief, pp. 24-26.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The question presented by the Petitioner is not entirely descripitive of the questions in the instant case. The two questions presented are:

1. Is the condemnee deprived of due process contrary to the Fourteenth Amendment of the Constitution of the United States, when prohibited in a condemnation proceeding from adducing evidence which attacks the validity of zoning regulations where ample opportunity for direct attack existed prior to the condemnation proceeding?

2. Where applications to rezone residential land for commercial purposes have been denied by the appropriate zoning authorities, is the condemnee deprived of due process contrary to the Fourteenth Amendment to the Constitution of the United States, when evidence evincing the highest and best use of such condemned property in the condemnation proceeding is limited to the lawful purposes within the effective zoning regulations plus any additional uses available by reason of the probability of a change in zoning?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following relevant constitutional and statutory provisions are contained in Petitioner's Brief (Apppendix E, p. 29).

Fourteenth Amendment to Constitution of the United States; Section 19, Article I, Ohio Constitution; Sections 163.02, 163.03, 163.06, 163.09, 163.14 of the Revised Code of Ohio.

Additionally, Sections 307.56 and 2506.01 of the Revised Code of Ohio are attached in Appendix A, infra, p. 16.

STATEMENT OF THE CASE

P. E. Masheter, Director of Highways, State of Ohio, hereinafter designated as the respondent, on July 14, 1969, appropriated 8.50 acres of land in the City of Columbus, Ohio for the construction of an interchange of Route I-270 and East Main Street in Columbus, Ohio. The petitioner, Mariemont, Inc., and Ohio corporation, is the owner of the 8.50 acres, of which 0.55 of an acre was occupied by the present road. The tract is located on the south side of East Main Street, City of Columbus, Franklin County, Ohio, midway between Noe-Bixby Road on the west and McNaughten Road on the east. Petitioner correctly states that the land, which is the subject of an appropriaion action filed by the Director of Highways of the State of Ohio, was at the time of its acquisition by Mariemont, Inc., located in the Township of Truro, County of Franklin, State of Ohio, and was subject to the Franklin County Zoning Resolution of 1948. Such resolution indicates that the subject property was zoned "Farm Residence."

Franklin County records indicate that the area in which the Mariemont, Inc. property is located, was annexed by the City of Columbus, Ohio, on November 17, 1958. Petitioner correctly states in his Statement of the Case that the property owner had filed an application with the Board of County Commissioners of Franklin County to have the property zoned under county zoning to "General Commercial" rather than "Farm Residence." There is no evidence adduced by the petitioner that an appeal or direct attack was ever made upon the denial by the Board of County Commissioners for the request to rezone the subject property, after the Board of County Commissioners denied the rezoning.

After the property in question was annexed to the City of Columbus, it was designated as "R-1" zoning, which permitted single family residences. Petitioner subsequent to the annexation, filed an application for rezoning with the City of Columbus zoning authorities requesting a zoning change of the property to "C-4" zoning, commercial use. The record indicates that the application was denied. Also, the record is completely devoid of evidence of any appeal by the petitioner from the adverse determination of the City of Columbus zoning authorities.

In the appropriation case which was tried before a jury in Franklin County Common Pleas Court, Columbus, Ohio, the petitioner over the objection of the Director of Highways, State of Ohio, introduced evidence that the subject property's highest and best use was commercial despite the fact that the zoning on the date of the take, July 14, 1969, was "R-1," family residence.

Petitioner's witness, Mr. George Little, testified (R. 24): "I felt the first 300 feet of this property would be, could be used for commercial purposes. The highest and best use of it, without doubt in my mind, is commercial." (R. 24) At this point there had been no testimony about zoning on the property, no testimony about denial of applications for rezoning for commercial purposes; and no testimony about the probability of a change in zoning. An objection and a motion to strike by the Assistant Attorney General was overruled.

The Director of Highways of the State of Ohio appealed from the verdict of the jury and a judgment entered pursuant thereto by the Court of Common Pleas of Franklin County on August 18, 1970. The Court of Appeals of Franklin County which rendered its decision on January 12, 1971, found error in the admission of evidence that the highest and best use of the property was commercial

and further found that it was error to include in an appropriation matter the question of the abuse of discretion by the legislative authority of the City of Columbus, and by inference the authority of Franklin County, in zoning regulations. The Court of Appeals reversed the judgment and remanded the cause for hearing in accordance with the decision. The Court's opinion which is attached to petitioner's brief as Appendices A and B, states at page 21:

> "It has generally been held that the validity of an existing zoning ordinance is not subject to a collateral attack in a trial for the determination of damages in eminent domain."

The Court in approving the above language stated at page 21:

> "This we believe is the generally prevailing rule and the rule in Ohio even though courts quite vigorously condemn the practice of keeping acquisition cost low."

The petitioner's motion to certify the record was denied by the Ohio Supreme Court. In addition, the Ohio Supreme Court overruled the appeal of petitioner as of right.

ARGUMENT

A. WHERE STATE STATUTES PROVIDE FOR APPEAL FROM DECISIONS OF ZONING AUTHORITIES, THE JURISDICTION OF THE TRIAL COURT DOES NOT INCLUDE THE RIGHT TO MAKE A DETERMINATION OF THE PROPRIETY OF ZONING DECISIONS WHICH WHERE THE PROPER SUBJECT MATTER OF APPEAL.

At page 20 of the decision of the Court of Appeals in the instant case, (Petitioner's Brief, Appendix A), is the following statement:

"In the instant case it must be said that there was, as in *Graham*, no evidence that in the foreseeable future there would be a rezoning of the real estate involved. In fact, the very approach of counsel for the landowner is an admission that there is no foreseeable change in zoning."

Beginning with this approach, counsel for landowner reached the conclusion that applications to amend zoning regulations on the subject property to commercial uses, were denied solely by zoning authorities because they were in collusion with highway officials to depress the value of the subject property.

The Court of Appeals further states (Petitioner's brief, Appendix A, page 22):

"To have included however in an appropriation matter limited to an award of compensation for real estate taken by the State of Ohio for highway purposes, the question of the abuse of discretion by the legislative authority of the City of Columbus, and by inference the authority for Franklin County, in zoning regulation, was error and not in accord with the law of Ohio."

At page 3 of Petitioner's Brief, it is stated:

"In 1958, prior to the property being annexed to the City of Columbus, the property owner filed an application with the Board of County Commissioners of Franklin County to have the property zoned under county zoning to 'General Commercial.' The Board of County Commissioners denied the rezoning because of an indication that there was to be some sort of an interstate route or highway that might come through this area. In 1958, when the application for rezoning was filed, the Board of County Commissioners had an oral understanding with the Ohio Department of Highways that the Board would not rezone any property that could be in the area of a future highway take."

Section 307.56 of the Revised Code of Ohio, entitled "Appeal from the decision of board of county commissioners," states:

> "A person aggrieved by the decision of the board of county commissioners in any case, may appeal within fifteen days to the court of common pleas, notifying the board of such appeal at least ten days before the time of trial. The notice shall be in writing, and delivered personally to the board, or left with the county auditor. At its next session, the court shall hear and determine the appeal, which decision shall be final."

Section 2506.01 of the Revised Code of Ohio, entitled "Appeal from decisions of any agency of any political subdivision," states in part as follows:

> "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.
>
> "The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law."

Headnote 1 of *Henle v. City of Euclid*, 97 O. App. 258 (1954) m.c.o. 162 Ohio St. 280, cited by petitioner (Petitioner's Brief, page 21), states:

> "A property owner is empowered to test by action seeking a declaratory judgment the constitutionality of the restrictions placed upon his property by a zoning ordinance."

The Ohio statute provided petitioner with the right of appeal from the decisions of Franklin County and City of Columbus zoning authorities affecting petitioner's property. A petition for a declaratory judgment afforded an additional remedy to test zoning regulations.

4 Nichols on Emnent Domain, (3d Ed.), Section 12.322, page 389, states in part:

> "Insofar as existing zoning restrictions circumscribe the available uses to which land may be devoted they unquestionably affect the market value of property and no evidence in support of an enhanced value may be admitted where such enhanced value would be the result of a proscribed use. It has been held that the owner cannot in the condemnation proceeding, attack the validity of a zoning ordinance where ample opportunity for direct attack existed prior thereto."

In *Robinson* v. *Commonwealth*, 335 Mass. 630 (1957) the trial judge, over the objection of the condemnee, excluded evidence that the applicable zoning ordinances restricting the lots being condemned to residential use were invalid and that if freed from the ordinances the land would otherwise have a substantial value. The Court rightly held at 728:

> "The petitioner had ample opportunity to attack directly the ordinances if he had desired to do so. He could have filed a petition in land court * * *, or he could have filed a suit for declaratory relief in the Superior Court * * * to determine the validity of the ordinances * * *; but in our opinion he could not at the trial of the petition for land damages against the Commonwealth attack the zoning ordinances. * * *"

In *Tharp* v. *Urban Renewal and Community Development Agency*, 389 S.W. 2d 453 (1965, Ky.), the property condemned was part of an urban renewal plan and had been rezoned from residential to light industrial. The property owners had sought unsuccessfully to have the property

rezoned to general business, while the condemning authority sought to have the residential classification retained.

The issue in the *Tharp* case is very similar to the instant case. In the condemnation proceedings, there was an attempt by the condemnees to offer evidence that "but for the influence of the condemnor, there would be a reasonable probability that the rezoning to general business would have been obtained." The court in refusing to allow the above evidence in a condemnation proceeding stated the appropriate law very succinctly:

> "Thus, it appears to us, it would not be appropriate to submit as an issue whether there is reasonable probability of obtaining a changed zoning in face of the action of the zoning authority. Such a submission would involve entirely collateral matters, to wit, the motives underlying the completed actions of the zoning authority and the factors both real and speculative that might influence their actions in the future."

We agree with petitioner's statements of the law under the heading "A," (Petitioner's brief, page 6) with respect to due process guarantees afforded a condemnee by virtue of the Fourteenth Amendment to the Constitution of the United States. However, we disagree that the property owner is prevented from establishing the true value of his property by the rules of evidence adopted by state appellate courts in the case at bar. The appellate court held that the "question of the abuse of discretion by the legislative authority of the City of Columbus, and by inference the authority for Franklin County, in zoning regulation" could not be included in the trial of an appropriation case. (Petitioner's Brief, Appendix A, page 22). The rulings of the appellate court do not result in the confiscation of petitioner's property, but merely place limitations on jurisdiction in the trial of an appropriation case.

B. IN ARRIVING AT THE FAIR MARKET VALUE OF PROPERTY IN AN EMINENT DOMAIN PROCEEDING, TESTIMONY OF THE HIGHEST AND BEST USE OF THE PROPERTY IS LIMITED TO LAWFUL PURPOSES INCLUDING THE PROBABILITY OF A CHANGE IN ZONING TO PERMIT A MORE VALUABLE USE WITHIN THE REASONABLY FORSEEABLE FUTURE.

Landowners offered no evidence that there was a probability of a change of zoning in the reasonably foreseeable future, as noted by the appellate court. (Petitioner's Brief, Appendix A, p. 20). The testimony of landowners was that a change of zoning had been denied because of an agreement with the Highway Department, and for that reason they were entitled to testify to a highest and best use for commercial purposes as if the change in zoning was an accomplished fact.

4 Nichols on Eminent Domain, (3d Ed.), page 238, states:

> PROBABILITY OF REZONING.
>
> "Where the enactment of the zoning restrictions is not predicated upon the inherent evil of the proscribed use—in other words, where the forbidden use is *malum prohibitum* rather than *malum in se*—and there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value. It follows from the foregoing that such possible change in the zoning regulations must not be remote or speculative.
>
> "An important caveat to remember in applying the rule is that the property must not be evaluated as though the rezoning were already an accomplished

> fact. It must be evaluated under the restrictions of the existing zoning and consideration given to the impact upon market value of the likelihood of a change in zoning. The caveat does not, of course, apply, and the evaluation may be predicated upon rezoning, as an accomplished fact, where the existing zoning was arbitrarily adopted for the sole purpose of depressing land values preliminary to eminent domain proceedings."

The principle of law included in the citation above is pertinent here for the reason that no zoning was arbitrarily adopted to depress land values. The existing zoning had been in effect since 1948.

Two Ohio cases which include a decision on the effect of zoning in appropriation cases are:

First, *City of Euclid* v. *The Lakeshore Co.*, 102 Ohio App. 96 (1956) m.c.o., app. dis. 165 Ohio St. 501 (1956), cert. den., 352 U.S. 1025. Headnotes 6 and 7 read as follows:

> "The determination and fixing of zoning classifications within a municipal corporation is within the sound discretion of its legislative authority in the exercise of the police power to protect the public health, morals, safety and the general welfare of the people.
>
> "In a proceeding to determine the value of land appropriated for public purposes, the trial court should not permit evidence of speculation or what may be the legislative policy of a municipal council in the future in changing a particular zoning classification, where such evidence is considered for the purpose of fixing the value of the land taken."

Second, *Board of Education* v. *Graham*, 15 Ohio App. (2d) 196 (1968), is in full support of *Lakeshore*. The headnote of *Graham* is as follows:

> "The admission of testimony of a property owner in a trial to determine the value of his appropriated

> property, that he 'hoped' to obtain a change in the zoning of such property to permit a more valuable use thereof, is prejudicial error, where there is no competent evidence whatsoever that a change in the zoning classification would be likely to occur."

At page 201, after quoting from *Lakeshore*, the court states:

> "We hold this to be the law of Ohio upon the subject involved. Therefore, we are confronted with the question whether there was any evidence that within the reasonably foreseeable future the legislative authority of the City of Wilmington would rezone the real estate. * * *
>
> "No testimony was offered nor, apparently, was any available from the lips of those who would be required to administer the zoning laws. Certainly, from those responsible for the administration of the zoning ordinances would come the best evidence upon the matter."

The petitioner cites Opinion No. 69-098, dated August 5, 1969 by the Attorney General of Ohio, Paul W. Brown, (Petitioner's Brief, Page 10). That opinion dealt with the effect, for appraisal purposes, of Section 5511.01, Revised Code of Ohio, upon the determination of the value of property being appropriated, with particular reference to determination of the highest and best use of the property. Section 5511.01, Revised Code of Ohio, provides for a moratorium on zoning changes and building permits for a period of 120 days.

We agree fully with the opinion of Attorney General Brown, but believe it is neither pertinent nor relevant for the reason that the effective date of the statute is November 14, 1967, and its provisions did not affect subject property. However, since the opinion has been cited by Petitioner.

It should be pointed out that the Attorney General further stated:

> "The Courts of Ohio, in applying and interpreting these constitutional guarantees, have held that the question to be decided in an appropriation proceeding is the value of the property for any and all uses for which it may be suitable, including the most valuable uses to which the property can lawfully, reasonably and practically be adapted. *Sowers* v. *Schaeffer*, 155 Ohio St. 454 (1951); *Board of County Commissioners* v. *Thormyer*, 159 Ohio St. 291 (1959).

C. WHERE IT IS SHOWN THAT OTHER SIMILAR PROPERTY IN THE AREA WAS RECENTLY REZONED OR THAT DEVELOPMENT IN USE PATTERNS HAS BEEN SUCH THAT A RECLASSIFICATION WOULD FIT SUCH ZONING PATTERN OR USE, WE CANNOT AGREE THAT THIS USE MAY THEN BE CONSIDERED AS THE PROPERTY'S HIGHEST AND BEST USE WHEN CONTRARY TO ITS EXISTING ZONING. A REFUSAL TO ADMIT SUCH EVIDENCE DOES NOT DEPRIVE AN OWNER OF HIS PROPERTY WITHOUT DUE PROCESS.

On direct examination, Mr. Boyd, an independent fee appraiser and witness for the respondent, was asked "* * * have you talked with any of the zoning officials of the City of Columbus in regard to the zoning of the area in which Mariemont is located" and "What did they tell you?" (R. 251) He testified:

> A. "Well, I can show you easier. First of all, I talked with Mr. Grant Dyer and Mr. Smithers at the Zoning Office, and the answers on several occasions were all pretty much the same. Columbus—and this is in Columbus now—no longer favors what they call commercial strip development, which means this type of development down the frontage strip of a road or

a highway in a city at least. They now believe in, and good planning dictates, that commercial zoning should be clustered or grouped primarily at major traffic intersections. Therefore, this is why we see this, of course, at interchanges of freeways and expressways and why the outlying residential type shopping centers have sprung up. The city favors this type of development, and they want to get away from the shabby appearance of strip development, all part of the present ecology drive, I guess. But, it is just that they don't want the landscape all full of billboards and small commercial development and so forth. They want them clustered. I was told by these men that the logical place for any commercial zoning in this area, if they were to grant it, would be, and eventually turned out to be, at the intersection of McNaughton and—or down here at the intersection of the relocated Noe-Bixby Road. It was highly unlikely that they would view favorably any request for commercial zoning between these points. They indicated that this zoning, which is on the property now, apparently it is—I think in this instance here, it is this colored lines here, and they indicate fairly well what the zoning is. They indicate that that zoning was granted as a result of the proposed alignment of this freeway and the interchange at Main Street and that this is in accordance with their overall plan and theory and philosophy of granting higher types of use around interchanges and around particularly highway oriented uses, commercial uses, which would be service stations and so on and so forth. They are clustered right around the interchanges." (R. 251, 252, 253)

The evidence shows commercial zoning along East Main Street in the City of Whitehall (R. 149) in Franklin County (R. 101) and in the City of Reynoldsburg (R. 146); additional commercial areas at the corner of East Main Street and Noe-Bixby Road and at the corner of East Main Street and McNaughten Road; also evidence of recent rezonings from residential to commercial at these two corners. In addition, there were rezonings from resi-

dential to commercial prior to July 14, 1969, the date of take of a part of the residue of parcels after the alignment of the new highway was determined. (R. 54 and 55.)

Petitioner's land in its location about midway between Noe-Bixby and McNaughten Roads, a distance of about three-quarters of a mile, was not affected by commercial zoning at the East Main Street corners at Noe-Bixby and McNaughten Roads. Commercial zoning in the Cities of Whitehall and Reynoldsburg, and Franklin County, did not affect subject property, for the reason that it was in the City of Columbus, a separate political entity, which was not being influenced in its zoning policy for this area by other political subdivisions. The commercial rezonings of residues of parcels after the alignment of the new highway was determined, should not be considered in determining highest and best use on the day of take. Those residues are a result of the coming of the new highway, and show the situation after construction is completed.

It is submitted that where the condemnee in an appropriation case is precluded from including the question of the abuse of discretion by legislative authorities in zoning regulations, and limited to a highest and best use of its property within the lawful zoning regulations, plus any additional value the property may have by reason of the probability of a change in zoning, there is no taking of condemnee's property without due process of law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

307.56 (2461). Appeal from decision of board of county commissioners.

A person aggrieved by the decision of the board of county commissioners may appeal to the court of common pleas, as provided by and under the authority of Chapter 2506. of the Revised Code. The court shall advance such appeal when perfected for immediate trial. (130 v H 396. Eff. 9-24-63)

2506.01. Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding. (127 v 963. Eff. 9-16-57.)